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IN THE

Supreme Court of the United States

October Term 1945

No. 371

LEO S. SACHAROFF,

Petitioner,

against

EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.

EMANUEL SCHIFFMAN,

No. 372

Petitioner,

against

EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

GEORGE A. FERRIS,
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10 East 40th Street,
New York City, New York.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Leo S. Sacharoff and Emanuel Schiffman, respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York reversing certain orders of the Appellate

Division of the Supreme Court of the State of New York in and for the First Department, which said last mentioned orders affirmed orders of the Special Term of the Supreme Court in New York County annulling the revocation by the Industrial Commissioner of the authorizations of the petitioners to render medical care under the New York State Workmen's Compensation Law.

A.

Statement of the Matter Involved.

The petitioners are duly licensed physicians of the State of New York. They were also specially authorized to render medical care under its Workmen's Compensation Law. In 1943 the Governor of the State of New York appointed so-called Moreland Commissioners under Section 8 of the Executive Law to inquire into the administration of the Workmen's Compensation Law.

Certain alleged disclosures were made which received widespread publicity. There were insinuations against many persons including physicians. In consequence, proceedings were instituted by the Industrial Commissioner and his deputy, Goodman, under Section 13-d of the Workmen's Compensation Law, which is titled "Removal of Physicians from lists of those authorized to render medical care".

On August 6th, 1943, Goodman issued two orders revoking the authorizations of the petitioners. The name of Dr. Sacharoff was struck from the rolls upon two grounds, first, that he was guilty of accepting a rebate of fees from Bendiner & Schlesinger X-Ray Laboratories, Inc., and,

secondly, that he had declined to testify in a certain proceeding conducted on a previous occasion before another deputy industrial commissioner. The authorization of Dr. Schiffman was revoked upon two grounds. The first was identical with that referred to above in the case of Dr. Sacharoff and the second found him guilty of operating a medical bureau without an appropriate license.

In accordance with the sanction of Article 78 of the Civil Practice Act applications were made in behalf of both petitioners to annul such revocations. A number of legal and factual contentions were urged. In the case of Dr. Sacharoff Mr. Justice Walter at Special Term concluded that it was unnecessary to consider those contentions for the reason that the determination of the Industrial Commissioner was void. He examined critically the two subdivisions of Section 13-d of the Workmen's Compensation Law and found that, whereas under Subdivision 1 a doctor was entitled to a hearing with all that a hearing implies, under Subdivision 2, on the other hand, the Industrial Commissioner was granted the power, apparently, to revoke an authorization to render medical care upon mere "reasonable investigation". He reasoned that with respect to revocation all physicians constituted a single class and that it would be a violation of the constitutional guarantee of the equal protection of the laws

> "to say that charges of misconduct against certain undetermined and legally undeterminable members of the class are to be heard before a medical society or board with a right of review before the industrial council while similar charges against other undetermined and legally undeterminable members of the same class may be heard before the commissioner alone without any right of review before the industrial council."

He said that an investigation was not a hearing and that under all the circumstances it was his duty to reconcile both subdivisions, if possible, to avoid doubt of constitutionality. He was strongly of the opinion that the proper construction of Section 13-d was that Subdivision 2 was subject to and dependent upon Subdivision 1.

The opinion of the Special Term is reported in 182 Misc. 235.

Mr. Justice O'Brien at Special Term reached the identical conclusion on the application of the petitioner, Dr. Schiffman. Both orders were unanimously affirmed by the Appellate Division in 268 App. Div. 765, without opinion. They were reversed by the Court of Appeals in a unanimous opinion rendered by Judge Lewis. It is reported in 294 N. Y. 350. The opinion is set out in full in the appendix.

B.

The Question Presented.

In essence the problem is this:

Does it contravene the due process and equal protection clauses of the Constitution that some doctors, not designable by recognized or stated formula, are granted a hearing before a county medical society with the right of review before the Industrial Council while other physicians, similarly not designable by any recognized or stated formula, may be subjected to an "investigation" by the Industrial Commissioner? Even in the bare presentation of the question to be decided we believe it is fair to observe that the expression "reasonable investigation" in the statute is

not defined. The Industrial Commissioner may possibly, for all that is articulated, be empowered in the quietude of his own thoughts to determine for himself what constitutes "reasonable" and what is a sufficient "investigation". All that the hapless physician may know is that he has been "investigated", even "reasonably investigated", and that his authorization has been revoked.

C.

Reasons Relied on For Allowance of Writ.

It is a sad commentary on human intelligence that the sharp minds which are able to penetrate to the heart of the atom are unable to shape a world replete with social justice. This is the era in which the United States has constituted itself a pioneer in the spiritual elevation of the world. We are attempting to transport the flaming torch of our own idealism to countries long benighted. Let us beware that we do not maintain institutions which will justify other nations in pointing the finger of scorn at us and suggesting that we remove the beam in our own eyes before devoting ourselves to the mote in others.

Physicians practicing in workmen's compensation constitute a single class, certainly for purposes of revocation. The Legislature in Subdivision 1 of Section 13-d of the Workmen's Compensation Law apparently provided that "all charges" of misconduct be heard before a county medical society. In the event of an adverse decision a physician is entitled to a review by the Industrial Council and the additional privilege of presenting to that appellate tribunal further evidence. The Court of Appeals, overrul-

ing two judges at Special Term and five in the Appellate Division, has concluded that concurrent, although concededly diverse, procedures are enunciated. The Industrial Commissioner may for whimsical or capricious reasons or for no reason at all single out a particular physician and inform him that his authorization has been revoked as the result of a "reasonable investigation". To him there shall be denied a hearing and a review. He may never be informed of the character of the investigation or, indeed, that it ever took place at all. He may never acquire sufficient facts to enable him to reach an intelligent conclusion as to whether or not the investigation, if it did occur, was in fact reasonable.

Which physicians in the single category are entitled to the blessings of a full and public hearing with the right of review and which to the dubious mercies of a clandestine investigation by an administrative official?

D.

The Petitioners Are Presenting a Single Application.

While there are some variations in fact, for procedural and constitutional purposes both physicians are in the same classification. In all the appellate courts their position was regarded as the same and their grievance unitary.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York commanding that court to certify and to send to this court for its review a full and complete

transcript of the record of all proceedings in such suits, proceedings or matters and to stand and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York City,
August , 1945.

GEORGE A. FERRIS,
Of Counsel for Petitioners,
10 East 40th Street,
New York City, New York.

IN THE

Supreme Court of the United States

October Term 1945

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

This Court has Jurisdiction.

Constitutional questions were considered by the Special Term, the Appellate Division and the Court of Appeals. The opinions are eloquent in that regard. In the official

report appearing at 294 N. Y. 350, the contentions of counsel disclose that the petitioners presented for the reflection of the court both the due process and equal protection clauses of the Constitution.

There remains the matter of finality. It is true that the Court of Appeals "remitted to the Special Term for further consideration in accordance with this opinion". But as we understand the jurisdictional philosophy the question is not whether an order or judgment was denominated final by a state court but whether a particular right was finally adjudicated so that it can no longer be considered by the state. We rely upon the following excerpt from the determination in *Dept. of Banking* v. *Pink*, 317 U. S. 264, where the court wrote:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Ct., 278 U. S. 575, 73 L. Ed. 515, 49 S. Ct. 94; Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission, No. 160, decided October 12, 1942, 317 U. S. 588, post, 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962)."

The procedural and constitutional questions were fully adjudicated by the Court of Appeals and are not subject to a further review. While there was a remission to the Special Term it was only for the consideration of such questions of law and fact as were initially urged but never

decided. If this case does not fall in the category of a matter fully adjudicated and not subject to review then it would be difficult to conceive of a decision not denominated final which could nevertheless be submitted to this court.

POINT II

The matter involved is of great public importance.

In the application to the Court of Appeals for leave to appeal to that court the Attorney General, representing the Industrial Commissioner, wrote:

> "It is clear from the foregoing that the issues respecting the jurisdictional extent of the Commissioner's statutory powers of removal (as more fully developed in the subjoined brief), which have never previously been passed upon by this or any other Court of this State, are of paramount public importance. The ultimate determination of those issues is obviously of great moment to the proper administration of the Workmen's Compensation Law, and accordingly should be made by this Court."

In his brief to the Court of Appeals the Industrial Commissioner observed:

> "So far as its alleged constitutional aspects are concerned, the precise situation conceived by Special Term seems not to have been considered by other courts, * * *."

Finally, and as additional evidence of the paramount importance of this matter, consider the further language used by the Attorney General in a recent affidavit:

> "The instant proceedings are in the nature of test cases. On their outcome hinges the fate of hundreds of other physicians whose cases are being held in abeyance pending the final outcome of these proceedings."

Beyond the compelling declarations of the opposition it seems clear that the issue resides in the controversy between a full hearing which this government normally guarantees to its free citizens and the species of dictatorship which is inherent in the grant of power to an administrative official to destroy the career of a physician upon what seems to him a "reasonable investigation".

POINT III

A construction of Section 13-d of the Workmen's Compensation Law which deprives an accused physician of notice of charges and a hearing at which he may defend himself on the merits and grants to the Industrial Commissioner the power of summary revocation is arbitrary and undemocratic and violates the due process and equal protection clauses of the constitution.

The statute in question reads:

> "13-d. Removal of Physicians from lists of those authorized to render medical care.
>
> 1. The medical society or board that has recommended the authorization of physicians to render medical care under this chapter shall investigate, hear and determine all charges of professional or other misconduct by any authorized physician, as herein provided, under rules and procedure to be prescribed by the industrial council of the department of labor and shall report evidence of such mis-

conduct, with their determination thereon, to the commissioner. Such investigation, hearing, report and determination may be made by the board of an adjoining county upon the request of the medical society of the county in which the alleged misconduct or infraction of this chapter occurred. The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commissioner.

2. The Commissioner shall remove from the list of physicians authorized to render medical care under this chapter the name of any physician who he shall find after reasonable investigation is disqualified because such physician (a) has been guilty of professional or other misconduct or incompetency in connection with medical services rendered under this chapter; or (b) has exceeded the limits of his professional competence in rendering medical care under this chapter or has made materially false statements concerning his qualifications in his application for the recommendation of the medical society in the county in which his office is located, or of the board designated by it, or of a board as provided in section thirteen-b; or (c) has failed to submit full and truthful medical reports to the commissioner, the industrial board, or the employer within the time limits provided in section thirteen-a, subdivision four, of this chapter with the exception of injuries which do not require more than ordinary first aid or loss of time beyond the working day or shift; or (d) has rendered medical service under this chapter for a fee less than fixed by the commissioner as the minimum rate in his locality; or (e) has participated in

> the division, transference, assignment, rebating, splitting or refunding of a fee for medical care under this chapter; or (f) has solicited, or has employed another to solicit for himself or for another the professional treatment, examination or care of an injured employee in connection with any claim under this chapter.
>
> Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, either before or after investigation by a medical society or board as herein provided, or to temporarily suspend the authorization of any physician that he may believe to be guilty of such misconduct."

The interpretation advocated by the Industrial Commissioner was frankly set forth in his brief to the Court of Appeals in this language:

> "It would seem that a hearing by the Commissioner under Subdivision 2 is not mandatory, but that in the proper exercise of his administrative discretion he may revoke for any cause as determined upon his own *ex parte* investigation." (Italics the Commissioner's.)

While we are dealing with an authorization to practice in compensation rather than a license as a physician in general, nevertheless the withdrawal of the privilege is "a consequence most severe and partakes of the nature of punishment".

Matter of Donegan, 282 N. Y. 285, 292.

It is a valuable property right which is entitled to be protected and secured under the Constitution and the laws of the State.

Matter of Bender v. *Board of Regents*, 262 App. Div. 627, 631.

The jurisdiction of the medical society under Subdivision 1, is to be exercised within the framework of certain special rules to be enacted by the Industrial Council of the Department of Labor. Under Section 10-a of the Labor Law, entitled "Industrial Council", a body of fifteen persons is formed, of which five shall represent the interests of labor, five of industry and five shall be physicians licensed to practice in the state. Subdivision 2 of that section adds that

> "The commissioner (industrial commissioner) shall be an additional member of such council and shall act as chairman thereof."

Subdivision 1 of Section 13-d grants the Industrial Council appellate powers. It provides:

> "The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commission."

Such language was intended to coincide with Section 10-a of the Labor Law, Subdivision 4-i, which provides that the Industrial Council shall

> "Review the determination of charges of misconduct where the physician accused appeals from the decision of the medical society or board which took jurisdiction in the first instance. In such cases the council may reopen the matter and receive fur-

ther evidence. And the decision and recommendation of the council shall be final, binding and conclusive upon the industrial commissioner."

In obedience to the requirements of Section 13-d of the Workmen's Compensation Law and Section 10-a of the Labor Law the Industrial Council promulgated certain rules. This is the heading; "Procedure Before Medical Societies." or "Compensation Boards of Medical Societies", Subdivisions 2-a, b and f are as follows:

"2. In any investigation or hearing before a medical society or board pertaining to the removal of physicians from lists of those authorized to render medical care under the Workmen's Compensation Law, or pertaining to the revocation of the license of a medical bureau, under Section 13-d of the Workmen's Compensation Law:

(a) The accused physician or medical bureau shall be given twenty days' notice of charges in writing, including a statement setting forth the specific section and subdivision of the law violated; the time, date and place of each alleged violation; and the time, date, and place of the hearing before the medical society or board.

(b) Stenographic minutes of such hearing or investigation shall be made and kept.

(f) The accused physician or medical bureau may, within thirty days after receipt of a copy of the medical society's or board's report, recommendation, determination and findings, file an appeal therefrom with the Industrial Council by written notice of appeal filed with the Council. Copies of this notice of appeal shall be mailed to the medical society or board, and to the Industrial Commissioner."

At the conclusion of the rules there is a statement of "General Policy of Procedural Rules" and this is the language:

> "In general, administrative adjudication, whether by the local medical society or board, or by the Industrial Council, shall be attended by procedures which assure due notice, adequate opportunity to present and meet evidence and argument, and prompt decision. It shall also be conducted according to established procedures and practices which shall assure adequate protection of right, benefits or privileges, the impartial conferring of authorized benefits or privileges, and the effectuation of the policies of the statute involved; but without undue formality."

Plainly, under Subdivision 1, an accused physician has important and well-defined rights. Certainly he is entitled to the following:

1. A notice of charges in writing.
2. A bill of particulars.
3. Stenographic minutes of a hearing.
4. Counsel.
5. The opportunity to cross-examine adverse witnesses.

Of course, in addition, the accused physician is granted the absolute right to appeal to the Industrial Council. It is provided that the Council "must" entertain the appeal. Not only that, but before the appellate body the physician may even reopen the case and introduce further evidence.

Such rights are of enormous value. They are rights which history indicates have frequently been won only after the shedding of much blood.

Before the Industrial Council a physician charged with a violation may argue his cause before fifteen men, not merely one, and these fifteen are representative of the medical profession, industry and labor. He therefore obtains a many-faceted consideration of his complaint.

Contrast these tremendously consequential privileges and rights under Subdivision 1 with the mere "reasonable investigation" prescribed by Subdivision 2. An investigation is not a hearing.

Even our adversaries cannot deny that there is a substantial variation between the procedures expressed in Subdivisions 1 and 2. There is a marked difference between a full hearing after notice and the absence of any hearing. Who, then, shall determine which physician shall have charges filed against him with the Medical Society and which hapless doctor shall be compelled to rely utterly upon the reinless caprice of the Industrial Commissioner who may one day inform him, to his very great astonishment, that his name has been stricken from the roll of doctors authorized to render medical care under the Workmen's Compensation Law—without notice, without charges in writing, without counsel, without cross-examination, without anything resembling a hearing—merely upon "reasonable investigation".

Such an interpretation of a statute, unless compelled by language unequivocal in character, is to be deplored. The courts have unhesitatingly condemned such procedure, even by an administrative body, as destructive of the principle of "fair play".

Morgan v. *U. S.*, 304 U. S. 1;
National Labor Relations Board v. *Prettyman*, 117 Fed. (2nd) 786, 790;

National Labor Relations Board v. *Sterling,* 112 Fed. (2nd) 63, 68;
Inland Steel v. *National Labor Relations Board,* 109 Fed. (2nd) 9, 20;
National Labor Relations Board v. *Sterling,* 109 Fed. (2nd) 194, 200;
Matter of Heaney v. *McGoldrick,* 286 N. Y. 38, 45;
New York Water Service Corp'n v. *Water Power & Control Commission of the State of New York,* 283 N. Y. 23;
Hilfer v. *Board of Regents,* 283 N. Y. 304, 308.

POINT IV

The decision of the Court of Appeals is at variance with its own decision in *People ex rel. Morriale* v. *Branham*, 291 N. Y. 312, and with the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1.

The antagonists remain a hearing on the one hand and an investigation on the other. In the *Morgan* case this court proclaimed with ringing eloquence the doctrine of "fair play". The phrase connotes a hearing upon notice with the right of cross-examination and the opportunity to prepare and assert a defense.

In that case it was contended that a general inquiry had been instituted for the benefit of society and that the apparently arbitrary and discriminatory practices were therefore justified. The argument was rejected by this court in the following terms:

> "The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile."

The interpretation of "reasonable investigation" to mean the absence of a hearing is clearly at war with the decision of the Court of Appeals in the *Morriale* case. There the court was confronted with a statute which provided for the issuance of an order "if satisfied that such prisoner is a mental defective". Chief Judge Lehman there wrote:

> "Unless the statute provides expressly or by necessary implication that an adjudication may be made without notice to the person whose detention or restraint is sought, we may reasonably find implicit in the statute a direction that the judicial decision and decree shall be made only in accordance with due process of law after notice and opportunity to be heard."

If the Court of Appeals intended to construe "reasonable investigation" under Subdivision 2 as a denial of a hearing to which a physician would be entitled under Subdivision 1, then it not merely strikes at the foundations of our social order and our conceptions of justice but is in conflict with the aforementioned decisions of this court and of the Court of Appeals itself.

POINT V

What we understand and what we do not.

The Court of Appeals has conceded that the procedures outlined in Section 13-d are diverse. Attempted justification is sought on the theory that all physicians of the same class are accorded the same treatment. But is that true upon analysis? Let us take New York County: The hundreds of physicians authorized to render medical care in

workmen's compensation are, for revocation purposes, in the same class. The Court of Appeals certainly did not intend to say that if some are arbitrarily selected for hearing, on charges of misconduct, before a medical society while others are "investigated" by the Industrial Commissioner they were being granted the same treatment.

The only explanation we can find is that the Court of Appeals intended to say this: That all physicians in New York County are potentially liable to be selected for investigation or for hearing. But instead of order there would result chaos. Admittedly, there are no rules or regulations to define which physicians are deserving of one treatment rather than another. It would seem to resolve itself into either a grab bag or the uncertain and frequently unjust vagaries of a blind fate.

We can understand according to one group a hearing before three judges and another before one. We can understand a hearing for one group before a jury and for another a judge without a jury. We can understand variations of procedure by reason of different geographic or special conditions. We can understand any kind of diverse procedure founded upon a definite reason.

But we cannot understand the wholly fortuitous selection of physicians in the same class and in the same county whose rights and responsibilities are identical—the selection of some for a hearing with all that is implicit in the term and of others for merely a "reasonable investigation" —an expression loose, undefined and fraught with peril.

In short, the diverse procedures must be consistent with due process and equal protection. Long ago it was written

in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, speaking of both the due process and equal protection clauses of the Fourteenth Amendment:

> "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The language has often been approved by this court.

Truax v. *Corrigan*, 257 U. S. 312, 333;
Missouri, ex rel. Gaines v. *Canada*, 305 U. S. 337, 350;
Skinner v. *Oklahoma*, 316 U. S. 535, 541.

CONCLUSION

We respectfully submit that this is a case eminently proper for review by this Honorable Court.

Dated, New York City,
August , 1945.

Respectfully submitted,

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Appendix—Opinion

In the Matter of LEO S. SACHAROFF, Respondent, v. EDWARD S. CORSI, as Industrial Commissioner, et al., Appellants.

In the Matter of EMANUEL SCHIFFMAN, Respondent, v. EDWARD S. CORSI, as Industrial Commissioner, et al., Appellants.

Decided May 24, 1945.

APPEAL, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 16, 1944, which unanimously affirmed, so far as appealed from, an order of the Supreme Court at Special Term (WALTER, J., opinion *sub. nom. Matter of Sacharoff* v. *Murphy*, 182 Misc. 235) made in a proceeding under article 78 of the City Practice Act to review the revocation by defendants of authority previously granted to petitioner to render medical care under the Workmen's Compensation Law. The appeal to the Appellate Division was from so much of the Special Term order as annulled the determination of the defendant Abraham S. Goodman, deputy Industrial Commissioner, revoking the authority of petitioner to render medical care under the Workmen's Compensation Law and directed reinstatement forthwith of petitioner to the panel of doctors authorized to render such medical care.

APPEAL, in the second above-entitled proceeding by permission of the Court of Appeals, from an order of the same Appellate Division, entered the same day, which unanimously affirmed, so far as appealed from, an order of the Supreme Court at Special Term (O'BRIEN, J.), also made in a proceeding under article 78 of the Civil Practice

Act to review the revocation by defendants of authority previously granted to petitioner to render medical care under the Workmen's Compensation Law. In this proceeding, the appeal to the Appellate Division was likewise from so much of the Special Term order as annulled the determination of said Deputy Commissioner revoking petitioner's authority to render medical care under the Workmen's Compensation Law and directed reinstatement forthwith of petitioner to the panel of doctors authorized to render such care.

Nathaniel L. Goldstein, Attorney-General (*Orrin G. Judd, William F. McNulty* and *Irving Galt* of counsel), for appellants in both proceedings.

Albert Adams for respondents in each proceeding.

LEWIS, J. The process of administering the Workmen's Compensation Law developed the fact that, if the statute was to serve the purpose for which it was designed, there must be available to injured employee-claimants medical care of first quality which is carefully regulated. (See *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271 [opinion by LOUGHRAN, J.] at pp. 276-7.) To that end the Legislature made statutory provision for the creation of a list of licensed physicians authorized to render such medical care. (Workmen's Compensation Law, §13-b.) The problem common to the two proceedings now before us involves alleged infractions of statutory regulations by the two respondent physicians which led in the first instance to the revocation by the Industrial Commissioner of their authority to render medical care under the statute.

By the present proceedings under article 78 of the Civil Practice Act the respondents secured at Special Term

orders annulling on procedural grounds the determinations by which their names had been stricken from the panel of physicians authorized to render medical care to injured claimant-employees. The orders of Special Term were affirmed unanimously at the Appellate Division. We have permitted appeals in the two proceedings which were argued together.

The following events gave rise to the two proceedings: after hearings on notice to the respondent Sacharoff a Deputy Industrial Commissioner found him guilty (1) of violating Workmen's Compensation Law, section 13-d, subdivision 2 (e) in that he had "participated in the division, transference, assignment, rebating, splitting or refunding of fees" and (2) of "misconduct" in violation of section 13-d, subdivision 2 (a) by "failing and refusing to take the stand and offer evidence and testimony in connection with an investigation conducted by the Deputy Industrial Commissioner." In the *Schiffman* proceeding, following a notice to that respondent that there was to be an investigation, he appeared and testified and thereafter was found guilty (1) of violating section 13-d, subdivision 2 (e) in that he had "participated in the division, transference, assignment, rebating, splitting or refunding of fees" and (2) of "misconduct" in violation of section 13-d, subdivision 2 (a) in that he operated a medical bureau without having secured a medical bureau license. Thereupon the authority of each respondent to render medical care to compensation claimants was revoked.

The determinations so made were annulled at Special Term upon the theory that to avoid discriminatory class

legislation the statute, quoted *infra*, must be construed as having devised a single method of removal in which subdivision 2 of section 13-d was subject to and dependent upon subdivision 1 of the same section. The construction thus placed upon the statute led to a ruling at Special Term that, in the absence of proof that such revocations had been ordered in accord with subdivision 1, after hearings before a medical society or board and upon recommendation by such society or board subject to review by the Industrial Council, the Industrial Commissioner was without statutory power under subdivision 2 to revoke the authorizations under which the respondents had rendered medical care.

The statute with which our problem is concerned—section 13-d of the Workmen's Compensation Law (as amd. by L. 1941, ch. 307)—provides:

"13-d. *Removal of physicians from lists of those authorized to render medical care.*

1. The medical society or board that has recommended the authorization of physicians to render medical care under this chapter shall investigate, hear and determine all charges of professional or other misconduct by any authorized physician, as herein provided, under rules and procedure to be prescribed by the industrial council of the department of labor and shall report evidence of such misconduct, with their determination thereon, to the commissioner. Such investigation, hearing, report and determination may be made by the board of an adjoining county upon the request of the medical society of the county in which the alleged misconduct or infraction of this chapter occurred. The industrial council of the department may review the determination of such medical society or board,

and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commissioner.

2. The Commissioner shall remove from the list of physicians authorized to render medical care under this chapter the name of any physician who he shall find after reasonable investigation is disqualified because such physician (a) has been guilty of professional or other misconduct or incompetency in connection with medical services rendered under this chapter; or (b) has exceeded the limits of his professional competence in rendering medical care under this chapter or has made materially false statements concerning his qualifications in his application for the recommendation of the medical society in the county in which his office is located, or of the board designated by it, or of a board as provided in section thirteen-b; or (c) has failed to submit full and truthful medical reports to the commissioner, the industrial board, or the employer within the time limits provided in section thirteen-a, subdivision four, of this chapter with the exception of injuries which do not require more than ordinary first aid or loss of time beyond the working day or shift; or (d) has rendered medical service under this chapter for a fee less than fixed by the commissioner as the minimum rate in his locality; or (e) has participated in the division, transference, assignment, rebating, splitting or refunding of a fee for medical care under this chapter; or (f) has solicited, or has employed another to solicit for himself or for another the professional treatment, examination or care of an injured employee in connection with any claim under this chapter.

Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, either before or after investigation by a medical society or board as herein provided, or to temporarily suspend the authorization of any physician that he may believe to be guilty of such misconduct."

As we read the statute quoted above it gives to the Industrial Commissioner authority which thus far has been denied in the two proceedings at bar. In reaching that conclusion, with special reference to subdivision 2 of section 13-d, we adopt the ruling which was decisive in *Allen* v. *Stevens* (161 N. Y. 122 at p. 145) "* * * every provision of the statute was intended to serve some useful purpose, and in obedience to that rule, we now inquire whether this clause of the statute does not have a useful place therein, and yet is not in conflict with the letter and spirit of the rest of the statute." (See, also, *Palmer* v. *Van Santvoord*, 153 N. Y. 612, 616; *People* v. *Dethloff*, 283 N. Y. 309, 315.)

The Legislature has made the Industrial Commissioner responsible for the proper administration of the Workmen's Compensation Law. (Labor Law, §21, subd. 2.) Subsequent to that delegation of authority there was brought to the attention of the Legislature the fact that in the course of administering that law certain evils had developed, detrimental alike to worker and employer, which affected adversely the quality of medical care made available to injured claimants. (*Szold* v. *Outlet Embroidery Supply Co., supra*, pp. 276-7.) The remedy for such evils adopted by the Legislature (L. 1935, ch. 258, as amd. by L. 1941, ch. 307) included a statutory grant to the Industrial

Commissioner of independent authority under subdivision 2 of section 13-d to deal officially with those forms of professional misconduct, specifically referred to in that subdivision, which had seriously hampered the proper administration of the law. (See VI Benjamin, Administrative Adjudication [1942], p. 45, note 19.)

We are led by the unequivocal language of the statute to conclude that, in the absence of charges of professional or other misconduct filed against the respondents with a medical society or board which had set in motion procedure outlined in subdivision 1 of section 13-d, the Industrial Commissioner was not required to withhold—perhaps indefinitely the investigation he was authorized to make under subdivision 2. Indeed, by the last sentence of section 13-d the Legislature has enjoined us to treat the method of removal by the Industrial Commissioner prescribed by subdivision 2 as independent of action by a medical society or board under subdivision 1: "Nothing in this section (§13-d) shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, *either before or after investigation by a medical society or board as herein provided* • • •." (Italics mine.)

Under the caption of section 13-d—"Removal of physicians from lists of those authorized to render medical care"—the Legislature has prescribed two forms of procedure by which such removal may be accomplished. We are not convinced that these two forms of procedure are to be merged. The procedure outlined in subdivision 1 of section 13-d—not availed of in the present proceeding—contemplates a hearing by the medical society or board

with a right of review by the Industrial Council, while the procedure under subdivision 2 contemplates action by the Industrial Commissioner "after reasonable investigation." In that connection it is suggested that, in the absence of a standard to determine which of the two procedures was to be pursued in a given case, a physician whose professional conduct was the subject of inquiry would suffer impairment of his constitutional right to equal protection of the laws. Although the two concurrent procedures may be diverse, no deprivation of equal protection of the law results from such diversity. Under both subdivisions all physicians in the same class are "* * * treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." (*People* v. *Havnor*, 149 N. Y. 195, 205; *Hayes* v. *Missouri*, 120 U. S. 68, 72.)

In each case the orders should be reversed and the proceeding remitted to the Special Term for further consideration in accordance with this opinion, without costs.

Lehman, Ch. J., Loughran, Conway, Desmond, Thacher and Dye, JJ., concur.

Orders reversed, etc.

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SEP 12 1945

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

NOS. 371 AND 372—OCTOBER TERM, 1945

LEO S. SACHAROFF, *Petitioner,* *against* EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.	No. 371
EMANUEL SCHIFFMAN, *Petitioner,* *against* EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.	No. 372

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

September 11, 1945.

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Supreme Court of the United States

Nos. 371 and 372—October Term, 1945

Leo S. Sacharoff, *Petitioner,* *against* Edward S. Corsi, as Industrial Commissioner, and Abraham H. Goodman, as Deputy Industrial Commissioner.	No. 371
Emanuel Schiffman, *Petitioner,* *against* Edward S. Corsi, as Industrial Commissioner, and Abraham H. Goodman, as Deputy Industrial Commissioner.	No. 372

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals (per Lewis, J.) covering both proceedings, dated May 24, 1945, is reported in 294 N. Y. 305, 62 N. E. (2d) 81.

The only other opinion was that written in the first instance by Mr. Justice Walter at Special Term of the Supreme Court, New York County, in the *Scharoff* proceeding, reported in 182 Misc. 235, 44 N. Y. Supp. (2d) 117 (R. 229-246).*

Statute Involved

The statute construed in the opinion below is § 13-d of the New York Workmen's Compensation Law, as amended by L. 1941, c. 307, § 2 (prior to amendment by

* References are to the record in the *Sacharoff* proceeding, unless otherwise noted.

L. 1944, c. 459, § 3), dealing with the removal of physicians from the lists of those specially authorized to furnish medical care under the Compensation Law. We set forth the statute in its full text in the Appendix, *infra*.

Statement of the Case

1. *The proceedings before the Industrial Commissioner*

Petitioners are licensed physicians who, in addition, were specially authorized to furnish medical care under the Workmen's Compensation Law. Their special authorizations were revoked by the respondent Industrial Commissioner in two separate proceedings conducted by him under § 13-d, subd. 2 of that statute, without any proceedings or hearings having been held before, or charges preferred to, a county medical body under subd. 1 of said § 13-d (quoted in full Appendix, *infra*). In each instance, the Commissioner revoked on two grounds: Both petitioners were found to have violated subd. 2, subsec. *e* of the pertinent statute, in having accepted rebates or "kickbacks" of fees from an X-ray and laboratory-analysis firm to which they had referred many of their compensation patients; and also to have been guilty of "misconduct" in violation of subd. 2, subsec. *a* —one of them (Dr. Sacharoff) for having refused to submit to questioning in a prior investigation conducted by a Deputy Industrial Commissioner, and the other (Dr. Schiffman) for operating a compensation medical bureau without the license required therefor by Workmen's Compensation Law § 13-c (R. 211-219, 224-229, 245; *Schiffman* R. 55-62; see also 294 N. Y., at p. 308).

The revocation proceedings against petitioners were begun after an extensive investigation of workmen's compensation practice by commissioners specially appointed by the Governor of New York under the so-called Moreland Act (N. Y. Executive Law § 8). The report of the

commissioners disclosed widespread violation of the statutory prohibition against fee-splitting and numerous instances of overtreatment of patients by physicians, all to the detriment of the industries and workers for whose benefit the law was enacted (BLEAKLEY and STICHMAN, *Administration of the Workmen's Compensation Law in N. Y.* [1944], pp. 26, *et seq.;* see also R. 228).

The petition's constant references to revocation without notice or hearing (*e. g.,* p. 6; brief, p. 18) have no basis whatever in the facts of the cases actually presented to this Court. Thus, the revocation of Dr. Sacharoff's special authorization followed a series of lengthy hearings on notice and written charges before one of the respondents, Deputy Industrial Commissioner Goodman, with representation by counsel, cross examination of witnesses, and full stenographic minutes which are printed in the record (R. 18-211). Dr. Schiffman's authorization was revoked only after he had personally appeared and testified before Deputy Commissioner Goodman following written notice that there was to be an investigation to determine whether he should be removed (*Schiffman* R. 14-62).

Since we believe it clear that the judgment sought to be reviewed is not final (see Point I, *infra*), and since the petition relates to procedure rather than the merits of the cases, we think it sufficient merely to describe the type of evidence that was presented.

In Dr. Sacharoff's hearings there was testimony by employees of Bendiner & Schlesinger, Inc., an X-ray laboratory, that the cards representing patients referred by him were tabulated in the regular course of business, and cash representing 40% of the gross charges was put in an envelope each month and handed to the firm's messenger for delivery to him—and in one instance called for at the laboratory by a girl identified as one of his daughters (R. 64-109, 127-135, 171-176, 181-193, 213-216).

The firm's books were not produced, because they disappeared or were destroyed shortly after the public revelation of the extent of fee-splitting indulged in by Bendiner & Schlesinger (R. 90, 215; and see *Matter of Bleakley* v. *Schlesinger*, 294 N. Y. 312; BLEAKLEY & STICHMAN, *Administration of the Workmen's Compensation Law*, p. 27). Dr. Sacharoff's main argument on the merits was that, although he sat in the hearing room while evidence such as the foregoing was adduced and did not testify, the evidence was legally inadequate to support an inference that he received the "kickback" moneys which were set aside for him (R. 10-11, 229-230).

In Dr. Schiffman's case, he admitted under oath that he had received "gifts" of $400 or $500 from Mr. Schlesinger, of Bendiner & Schlesinger, Inc., during the year 1942, in appreciation of his patronage (*Schiffman* R. 26-30, 56-57). His argument on the merits is that a gift is not a rebate or "kickback" of fees in violation of the statute (*id.*, 66-67).

2. *The judicial review proceedings*

Petitioners brought separate proceedings in the New York Supreme Court under Article 78 of the Civil Practice Act (§§ 1283 *et seq.*) for judicial review of the determinations of the Industrial Commissioner revoking their authority to practice under the Workmen's Compensation Law (R. 2, 7-18; *Schiffman* R. 2, 9-11).

The initial judicial decision in these proceedings was made in the *Sacharoff* case on September 20, 1943, when Mr. Justice WALTER, sitting at Special Term, New York County, signed an order annulling the Commissioner's determination with respect to Dr. Sacharoff (R. 5-6), and handed down a written opinion elaborating upon the grounds—*entirely procedural*—of his decision (R. 229-246, 182 Misc. 235). The sum and substance of that opinion was that to avoid constitutional doubts of equal protec-

tion, Workmen's Compensation Law, § 13-d, should be construed so as to make the Industrial Commissioner's powers of revocation under subd. 2 thereof operative not directly upon his own "reasonable investigation" as therein provided, but only in accordance with a prior hearing and determination of charges by a county medical body, subject to review by the Industrial Council binding upon the Commissioner, if and when had under subd. 1. Mr. Justice WALTER's theory in thus merging the procedures under subds. 1 and 2 was that the statute otherwise would provide two concurrent but diverse procedures for revocation, to either of which any physician in the single class of compensation practitioners would be subject, and that this would violate constitutional rights of equal protection. Accordingly, he concluded that the Commissioner had exceeded his powers in revoking Dr. Sacharoff's authorization without a prior proceeding before a medical society (see especially R. 240-243, 182 Misc., at pp. 241-245).*

Mr. Justice O'BRIEN, also sitting at Special Term, New York County, thereupon followed suit with a concurring determination and order in the *Schiffman* proceeding (*Schiffman* R. 5-7, 87). The Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed the orders in both the *Sacharoff* and *Schiffman* proceedings in June, 1944, without opinion (265 App. Div. 765, 50 N. Y. Supp. [2d] 168).

Respondents were granted leave to appeal to the Court of Appeals in both cases by orders of that Court dated October 12, 1944 (R. 251-252; *Schiffman* R. 93). The Court below, in unanimously reversing the orders of affirmance by the Appellate Division on May 24, 1945, remitted the cases to Special Term *for further proceedings in accordance with its opinion,* which covered both cases

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* This theory of Mr. Justice *Walter's* was not even remotely suggested in the *Sacharoff* petition initiating the proceedings below, which, as examination will show (R. 9-11), merely sought review of the Commissioner's determination on the merits.

and was restricted to the determination of procedural problems of statutory construction *without reference to the merits* (R. 255-258; *Schiffman* R. 98-101, 294 N. Y. 305).

As matters stand, consequently, the substantive merits of either case have yet to be considered—far from having been decided—by any Court; and the patent lack of finality in the decision below, we submit, precludes the exercise of jurisdiction by this Court, as will more fully appear under Point I, *infra*.

3. *Basis of the decision below*

In construing the pertinent statute (Work. Comp. Law, § 13-d), the Court below simply held in essence that, giving full and normal effect to all its parts, the Industrial Commissioner clearly is empowered to revoke the special authorization of a workmen's compensation practitioner directly on his own "reasonable investigation" under, and for any cause specified in, subd. 2, "independent of [possible] action by a medical society or board under subdivision 1" (294 N. Y., at p. 311). Regarding the element of equal protection imported into the cases by the decision and opinion of Mr. Justice WALTER at Special Term, the Court below merely observed in passing that it had no relevance whatever to a situation involving members of a single class (specially-authorized compensation physicians), all subject alike to removal by concurrent, if varying, procedures, commenting (*id.*, at p. 312):

> "Under both subdivisions all physicians in the same class are '* * * treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' (*People* v. *Havnor*, 149 N. Y. 195, 205; *Hayes* v. *Missouri*, 120 U. S. 68, 72.)"

Due process considerations were not expressly mentioned by the Court below. They could not possibly have

been relevant to that Court's decision to the effect that the Industrial Commissioner has independent revocation powers under subd. 2 of the statute involved, save in one obviously collateral respect, *i. e.*, whether the exercise of such powers on the Commissioner's own "reasonable investigation" (subd. 2) makes mandatory a hearing before him. For this is the only respect in which the question of due process is sought to be raised in the petition and supporting brief (see petn., pp. 4-6; brief, Points III and IV, pp. 12-22); and petitioners concede that the procedure outlined in subd. 1 of the statute calls for a hearing on charges before a medical body (*e. g.*, petn., p. 4; brief pp. 17-18).

In the last analysis, the Court below could have concluded, as it did, that the Commissioner had independent revocation powers under subd. 2, and then have gone on to hold *either* that a hearing was, or was not, mandatory to the proper exercise of those powers. It may be inferred that it actually (although not expressly) determined that the Commissioner was *not* obliged to afford a hearing under subd. 2, as indicated by its contrasting references to a "hearing" before a medical body under subd. 1, and to a "reasonable investigation" by the Commissioner under subd. 2 (294 N. Y., at p. 312).* It will be shown that there is no substantial question about the correctness of that holding (assuming the orders herein were final and reviewable in this Court). However, the significance of that holding from a due process standpoint in this Court is limited by the facts in these cases—*viz.*, that hearings (albeit apparently optional rather than mandatory) were given in both cases.

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* We argued and took the position in the Court below that the phrase "reasonable investigation" in subd. 2 should not be construed to require a hearing by the Commissioner in order to revoke thereunder, unless it were to be determined that due process considerations required otherwise (and the Court below made no such holding).

We shall contend under Point II, *infra*, that no substantial federal question—either of equal protection or due process—is presented here.

4. *Petitioners' misleading references to the Industrial Commissioner's powers*

In passing, we call attention to petitioners' repeated mis-statements regarding the effect of the failure of the Court below to hold that the Industrial Commissioner is obliged to afford a formal hearing in order to revoke a special compensation authorization upon his own investigation, under subd. 2 of the pertinent statute. For instance, they broadly assert that the Commissioner thus becomes the sole judge of what constitutes a "reasonable" or "sufficient" investigation (petn., p. 5); and that for "whimsical or capricious reasons" he may "single out" particular physicians to be removed upon his own investigation under subd. 2 (*id.*, p. 6). They also speak of the "reinless caprice of the Industrial Commissioner" (brief, p. 18).

All of the allusions in that vein, of course, are entirely unfounded and misleading. To begin with, they are amply refuted by the fact that, as we have shown, the Commissioner gave hearings to both petitioners in exercising his powers under subd. 2, although this would appear to have been a matter of privilege and not of right. Moreover, the exercise of his powers of revocation under subd. 2 are not only restricted to the causes there specified, but are subject to judicial review by proceedings under Article 78 (§§ 1283, *et seq.*) of the New York Civil Practice Act—as in the present cases—to determine whether his action was lawful and warranted, or merely arbitrary and capricious.

Jurisdiction

(1)

Petitioners necessarily seek to invoke the jurisdiction of this Court under Judicial Code § 237, as amended by the Act of Feb. 13, 1925 (28 U. S. C. A. § 344, subd. b; 43 Stat. 937), to review by certiorari a "final judgment or decree" of a state court of last resort. They have maintained in Point I of their brief (pp. 9-11) that the decision of the Court below is "final" within the meaning of that statute. (The petition itself contains no jurisdictional statement as required by Rules 12 [1] and 38 [2] of the Rules of this Court.)

Respondents will show, however, that the decision under consideration definitely lacks the element of finality prerequisite to the exercise of jurisdiction by this Court. See Point I, *infra,* pages 11-16. It will be recalled that the Court below, far from making any final disposition of these cases, ordered them remanded to Special Term of the Supreme Court, New York County, for initial consideration of the merits in accordance with its unanimous opinion dealing with questions of statutory construction from a purely procedural standpoint (R. 255-258, 294 N. Y. 305). In the present state of these proceedings, the chronology and details of which we have already outlined, there has been as yet no consideration of either case on the merits, much less any truly final determination; and this Court, we submit, is therefore without jurisdiction.

(2)

Since this is a petition to review the decision of a state court, another prerequisite to the exercise of jurisdiction by this Court, of course, is that a substantial federal question should be tendered which was actually

or necessarily decided by the Court below. Petitioners assert that a federal question of due process and another of equal protection are here presented with respect to the lower Court's interpretation of Work. Comp. Law § 13-d (petn., pp. 2-5).

Respondents will take the position that such questions either are not presented at all or, if presented, are not of the substantial character necessary to warrant review by this Court (Point II, *infra*).

Outline of Argument

I. The Court below merely having determined preliminary problems of statutory construction and procedure entirely without reference to the merits of the cases, which it remanded for further proceedings consistent with its opinion, its decree is not final and complete within the meaning of Judicial Code § 237, subd. b, as amended. This Court, accordingly, is without jurisdiction; and the petition should be dismissed.

II. Irrespective of the question of finality, the petition fails to present any substantial federal question for review. The Court below rightly held that constitutional requirements of equal protection are not violated or involved by a statute prescribing two concurrent, but diverse, procedures for revoking the special compensation authorization of any physician, for cause. Nor does any substantial question of due process result because the Industrial Commissioner is given power to revoke such special privilege on his own "reasonable investigation".

POINT I

The Court below merely having determined preliminary problems of statutory construction and procedure entirely without reference to the merits of the cases, which it remanded for further proceedings consistent with its opinion, its decree is not final and complete within the meaning of Judicial Code § 237, subd. b, as amended. This Court, accordingly, is without jurisdiction; and the petition should be dismissed.

1.

The decision of the Court below, as shown in our resumé of the proceedings, *ante*, pages 5-6, did not serve to terminate the litigation in the state courts but, on the contrary, remanded both cases for further proceedings consistent with the Court's opinion dealing with statutory construction and procedure, without passing upon the merits (which had not been considered at any stage of the proceedings). Such a decree, we submit, does not meet the jurisdictional requirements of Judicial Code § 237, subd. b, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 344, subd. b; 43 Stat. 937), which prescribes that certiorari shall issue only for the review of a "final judgment or decree * * * by the highest court of a state in which a decision could be had * * *." We recognize, of course, that finality for purposes of that statute must be determined in the light of this Court's views, without reference to state practice and parlance.

This Court, in *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U. S. , 65 S. Ct. 770, 89 L. Ed. 788 (Nos. 510 and 511, decided March 26, 1945), recently had occasion to restate the standards to be applied in de-

termining whether a decree is final within the meaning of the foregoing statute, as follows (89 L. Ed., at p. 791):

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. A. § 344, 8 F. C. A. title 28, § 344. Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; *it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.*" (Italics ours.)

See, also, *Catlin* v. *United States,* 324 U. S. 229, where, referring to "final decisions" within the requirements of Judicial Code § 128, the Court said (p. 233):

> "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

The decree tendered for review in this instance obviously is not "final" under those standards. It is plainly of an interlocutory or intermediate, as opposed to final, nature: It disposes only of questions of statutory procedure without reference to substantive merits; it remands both causes for further judicial proceedings in lower state courts; in brief, it leaves wide open and pending—far from concluding—the litigation between the parties. This Court, in a long series of decisions, has held time and again that it is without jurisdiction to review state court decisions having those characteristics. See, *e. g., Kimball* v. *Evans,* 93 U. S. 320, 321; *Cincinnati Street Railway Co.* v. *Snell,* 179 U. S. 395, 397-398; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3; *Haseltine* v. *Central Bank,* 183 U. S. 130; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, 268; *Louisiana Navigation Co.* v. *Oyster Comm'n,* 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251; *Georgia*

Ry. Co. v. *Decatur,* 262 U. S. 432, 437; *Western Public Service Co.* v. *City of Mitchell,* 289 U. S. 709 (determination of constitutional issues prior to completion of proceedings non-final); *Mississippi Central R. Co.* v. *Smith,* 295 U. S. 718 (decision remanding for new trial to assess damages only non-final); *Laclede Gas Co.* v. *Comm'n,* 304 U. S. 398, 400; *Cheltenham* v. *Public Utility Comm'n,* 317 U. S. 588 (decision authorizing restitution for overcharges and remanding for fixation of damages). For instance, it was long since held in *Kimball* v. *Evans, supra* (93 U. S. at p. 321):

> "The judgment of the [State] Supreme Court is not the final judgment in the suit. It disposed finally of one of the questions involved in the suit, but not of the suit itself. The suit is still pending in the [State] District Court, and it is not impossible that the parties now complaining may be satisfied with the judgment which they may in the end be able to secure in the State courts. If not, after a final judgment has in fact been rendered by the highest court of the State in which a decision in the suit can be had, the case may be again brought here for a determination of the questions arising upon the petition for removal."

And in *Cincinnati Street Railway Co.* v. *Snell, supra,* the Court declared (179 U. S., at p. 397):

> "We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court. It is true that the order appealed from finally adjudges that a change of venue should have been allowed; but the same comment may be made upon dozens of interlocutory orders made in the progress of the cause. Indeed, scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order until the action itself has been finally disposed of."

The test as stated in *Bostwick* v. *Brinkerhoff, supra,* was that (106 U. S., at pp. 3-4)

> "a judgment or decree to be final * * * must terminate the litigation between the parties on the merits of the case * * *. If the judgment is not one which disposed of the whole case on its merits, it is not final."

A state decree does not become "final" for purposes of this Court's jurisdiction merely because, under local practice, the matters adjudicated may establish the law of the case to that extent for purposes of all subsequent proceedings and appeals in the cause. Assuming that it involved determination of substantial federal questions, this Court would not be foreclosed from considering them, together with any others which may thereafter have been raised in the subsequent proceedings, upon the ultimate conclusion of the litigation in the state courts. See *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256-257. See, also, *Davis* v. *O'Hara,* 266 U. S. 314, 321.

2.

Petitioners, ignoring or overlooking the considerations and authorities referred to above, insist that the decision of the Court below is "final" for the jurisdictional purposes of Judicial Code § 237, saying that it suffices if even one "particular right was finally adjudicated so that it can no longer be considered by the state"—irrespect of whether this served to decide and dispose of the entire controversy (brief, Point I, p. 10). They take that position in sole reliance (*id.*) on an excerpt from this Court's opinion in *Dept. of Banking* v. *Pink,* 317 U. S. 264, where it was said (p. 268) that the test of finality under that statute "is not whether under local rules of practice the judgment is denominated final" but rather (*id.*)

> "whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court * * *."

We submit, however, that the quoted excerpt is not susceptible of the interpretation which petitioners would give it. The *Pink* case simply involved the question whether a state court decision, for purposes of computing the time in which to invoke this Court's jurisdiction, becomes final upon the date rendered or upon the date of completion of any further ministerial steps required to make it final under the designation applied in local practice (*cf. Market Street R. Co.* v. *Railroad Comm. of Cal.*, 324 U. S. , 65 S. Ct. 770, 772-773, 89 L. Ed. 788, 791). This Court, holding that local designations are immaterial for its purposes, and citing *Mower* v. *Fletcher*, 114 U. S. 127, said that a state court's decree becomes reviewable (317 U. S., at pp. 267-268)

> "when it end[s] the litigation *by fully determining the rights of the parties,* so that nothing remain[s] to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. * * * This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals *is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur.* Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here." (Italics ours.)

The present petition, unlike the *Pink* case, does not involve a decision which terminates the litigation and completely adjudicates all the issues between the parties, with nothing remaining but the performance of a purely ministerial act in order to make the decree enforceable under local practice requirements. Here the merits have yet to

be adjudicated by any court; nothing having been decided beyond a preliminary matter of statutory interpretation and procedure.

Petitioners' complete misconception of the nature and effect of the ruling in the *Pink* case, in the last analysis, is best evinced in the light of this Court's subsequent pronouncement in *Market Street R. Co.* v. *Railroad Comm. of Cal., supra,* as follows (89 L. Ed., at p. 791):

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. A. § 344, 8 F. C. A. title 28, § 344. Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; *it must also be final as an effective determination of the litigation* and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court.*" (Italics ours.)

POINT II

Irrespective of the question of finality, the petition fails to present any substantial federal question for review.

The Court below rightly held that constitutional requirements of equal protection are not violated or involved by a statute prescribing two concurrent, but diverse, procedures for revoking the special compensation authorization of any physician, for cause.

Nor does any substantial federal question of due process result because the Industrial Commissioner is given power to revoke such special privilege on his own "reasonable investigation."

It will be recalled that the Court below construed the pertinent statute (Work. Comp. Law § 13-d, Appendix, *infra*) as authorizing the Industrial Commissioner, upon his own "reasonable investigation" under subd. 2 thereof,

to revoke a special compensation authorization, "independent of [possible] action by a medical society or board under subdivision 1" (294 N. Y., at p. 311). The Commissioner's exercise of such powers was not held to require the granting of a formal hearing as a matter of right. The Court, in passing, disposed of the theory introduced into the cases by the opinion of Mr. Justice WALTER at Special Term in the *Sacharoff* proceeding, which had proceeded on the assumption that constitutional rights of equal protection would be impaired if the special compensation authorizations of any and all physicians could be revoked either by the Commissioner alone, acting on his own investigation, or as the result of a hearing on charges before a medical body, with administrative review by another body (see R. 240-243, 182 Misc., at pp. 244-245). Mr. Justice LEWIS, speaking for the Court below, rejected that theory as having no application to a single class of physicians, all equally subject to removal by concurrent, if diverse, administrative procedures (294 N. Y., at p. 312).

The question sought to be presented by the petition (pp. 4-5; and see brief, Points III and IV, pp. 12-22), as we understand it, is really twofold: (1) Whether a statute subjecting all members of but a single class to concurrent, diverse procedures for revocation of a special privilege is thus violative of equal protection requirements; and (2) whether such statute, to the extent that it provides for revocation upon the basis of a reasonable investigation by an administrative official, without making mandatory a formal hearing, violates due process requirements. Of course, it is obvious in any case that the second question can in no wise affect the validity of the main determination below, to the effect that the Industrial Commissioner has powers of revocation under subd. 2 of the pertinent statute, without reference to, and independent of, the procedure outlined by subd. 1.

A.

Point II of petitioners' brief is prefaced by the headnote (p. 11): "The matter involved is of great public importance." Several statements which we made in applying for leave to appeal to the Court below, and in our argument before that Court, are cited in support.

Although we agree that the issue with respect to the extent of the Commissioner's statutory powers was and is of considerable public importance, such as to have justified its consideration and determination by the Court below, we emphatically disagree with petitioners' apparent conclusion that it automatically follows that substantial or important federal questions consequently arise for review by this Court. Assuming that any federal questions of the nature suggested by petitioners may be said to exist in this case, it is our contention that they are not of the substantial character necessary to warrant review by this Court, as we shall proceed to show.

B.

Petitioners' contentions relative to constitutional requirements of equal protection are based entirely upon the theory imported into the cases by Mr. Justice WALTER in his opinion at Special Term in the *Sacharoff* proceeding, to which we have already alluded (the petition filed by Dr. Sacharoff in the proceedings below merely sought review of the Commissioner's determination on its merits [see R. 9-18]). They are not supported by reference to any decision of this Court with which the determination below may be said to conflict (*cf.* brief, Points III and IV, pp. 12-22), nor has our research disclosed any. This alone would appear to deprive the contentions of any possible weight or substance in this Court.

Certainly there is nothing novel or unusual in providing for concurrent yet diverse proceedings and remedies to

which all licensees or litigants of the same class are made subject, equally and alike. Thus, for example, the Court below has held in other litigation that a mayor of a municipality (N. Y. Civil Serv. Law § 11, subd. 6), the State Civil Service Commission (*ibid.*) and a municipal council (Optional City Gov. Law § 47) have valid *concurrent* powers of removal over municipal civil service commissioners. See *Matter of Cary* v. *Binghamton City Council*, 290 N. Y. 247. It is noteworthy that the statutory removal powers of the first-named official, for example, call for a public *hearing* on charges; and of the last-designated body, on the other hand, merely for due *opportunity for explanation*. No constitutional objections whatever were urged, or found to exist, with respect to the extremely diverse procedures for removal of the same official, available *concurrently* to three different administrative officers or bodies.

It has also been held that the Industrial Board of the State of New York, a merely administrative or quasi-judicial body, has *concurrent* equitable jurisdiction with the Supreme Court of that State over the reformation of compensation insurance policies. *Barone* v. *Aetna Life Insurance Co.*, 260 N. Y. 410. It need hardly be stressed that strikingly different procedures prevail in those two tribunals. And with reference to New York Penal Law § 1938, authorizing the imposition of one of several punishments prescribed by two or more statutes making the same act criminal, it has been held that the People may elect to prosecute either under a statute making a given act indictable and punishable as a felony, or under one which merely makes it a misdemeanor. See *People* v. *Malavassi*, 248 App. Div. 784, aff'd, 273 N. Y. 460.

The Constitution of the State of New York itself furnishes at least one striking example of the type of concurrent, dissimilar procedures of which we have been speaking, *i. e.*, the provisions for removal of State Su-

preme Court Justices. This may be accomplished either by concurrent resolution of both houses of the State Legislature (N. Y. Const. Art. VI, § 9); or by impeachment (*id.*, § 10). In the former case, a two-thirds vote of all the elected members of each house is necessary, and the judicial officer need only be afforded an opportunity to be heard. In the other instance, a majority of the State Assembly is given the power of impeachment, and the case is heard "according to the evidence" by the "president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them"; and a vote of "two-thirds of the members present" is sufficient to convict.

We note that no equal protection (or due process) contention was urged or mentioned in *La Forest* v. *Board of Commissioners,* 92 F. (2d) 547, cert. den. 302 U. S. 760, where a statute was held valid (one Justice dissenting) which, among other things, authorized the same administrative officers to revoke automobile drivers' permits either with *or without a hearing,* subject (as in the cases at bar) to review in judicial proceedings. We think it significant that the statute was challenged on totally different constitutional grounds than those sought to be raised in the present petition.

So far as equal protection aspects may be concerned, the present case in reality offers no substantial problem for consideration by this Court. As the Court below observed in passing, no question of that kind actually presents itself where all members of a single class are subject alike to the imposition of an administrative penalty by way of either of several concurrent, albeit diverse, procedures (*cf.* 294 N. Y., at p. 312). We are aware of no precedent in this Court—or any other, for that matter —which would bring such a case within the reach of equal protection requirements.

C.

Petitioners' argument with reference to due process, as already noted, appears to be restricted to a merely collateral or incidental feature of the case, and does not involve the validity of the main determination below (to the effect that the respondent Commissioner has statutory revocation powers independent and exclusive of the provisions for the hearing of charges by a medical society subject to review by another administrative body). Thus their contention, as we understand it, is simply that the Court below, in order to avoid due process difficulties, should have held specifically that a "reasonable investigation" by the Commissioner, in the exercise of his own separate powers of revocation, implies an absolute requirement for granting a formal hearing (*cf.* brief, Points III and IV, pp. 12-22).

At most, therefore, petitioners' due process contention concerns a narrow, subordinate issue in the case. It becomes even less significant when it is considered that in point of fact, both petitioners were given hearings by the respondent Commissioner: Dr. Sacharoff received a series of hearings on written notice and charges, at which witnesses appeared, testified and were cross-examined by his counsel; and Dr. Schiffman, having been notified in writing to appear for investigation to determine whether his authorization should be revoked, personally testified under oath before the other respondent, Deputy Commissioner Goodman, and admitted the receipt of substantial cash "gifts" in appreciation of his X-ray patronage (see the resumé *ante,* pp. 3-4). In view of those circumstances, the due process issue would further seem to be academic in its entirety, certainly at the present stage of these proceedings.

Even apart from the foregoing considerations, petitioners raise, we submit, no valid or substantial federal

question of due process. To begin with, they cite but one decision of this Court said to be at variance with the decision below on this branch of the case, namely, *Morgan* v. *United States,* 304 U. S. 1 (cited brief, pp. 18, 19). The *Morgan* case, however, is not at all apposite. There, the statute involved expressly called for a "full hearing" (see 304 U. S., at p. 15), and not, as in this case, for a "reasonable investigation" or a fair facsimile of the latter phrase. The principal issue in the *Morgan* case, therefore, was not whether a statutory phrase was to be, or should have been, interpreted as requiring the grant of a hearing (as in the present case), but whether a hearing—a "full hearing"—was in fact and law afforded *as expressly required* by the statute in question. In short, the distinction is that in the *Morgan* case, there was no question that a hearing was *required* by statute, and therefore by due process (*cf. Bowles* v. *Willingham,* 321 U. S. 503, 520). Petitioners also claim that the decision of the Court below conflicts with that previously rendered by the same Court in *People ex rel. Morriale* v. *Branham,* 291 N. Y. 312 (brief, pp. 19-20). Of course, even if that were true, we fail to see how such a circumstance—conflicting determinations by the same state court —could possibly serve to raise any federal question of any kind for review by this Court. In any event, the *Morriale* decision cannot be said to conflict with that below. In the cited case, a requirement for notice and hearing was read into a statute which provided for the retention of a prisoner even after the expiration of his term, upon the issuance of an order by a court "if satisfied" that such prisoner is a "mental defective"—the matter of a judicial decision, with personal liberty at stake, being held sufficient to imply necessity for a hearing on notice to obviate due process objections. In this case, on the other hand, no question arises of the magnitude of a matter of personal liberty; for we are here concerned with the withdrawal of merely a *special* privi-

lege, as contrasted, in turn, with the revocation of the much broader privilege of the practice of medicine generally (which is not at all involved in the present proceedings).

We can conceive of no reason for regarding the special privilege here involved as being entitled to greater respect and protection than the position held by a competitive civil service employee, who may be removed without a hearing merely upon sufficient written charges with opportunity to file an answer in writing (*e. g., Matter of Singer* v. *Graves*, 279 N. Y. 573). We know of no decision holding invalid the latter procedure for reasons involving due process. Moreover, it is to be borne in mind that the original requirement that physicians be specially authorized to furnish medical care sprang from the public need for careful supervision and regulation in a field where unscrupulous medical practices had become a notorious evil—in other words, it represents an instance of the exercise of state police powers. See *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 276-277, app. dism. 303 U. S. 622. There is nothing novel in providing for the revocation of a special privilege or license, issued under the police powers, without notice or hearing. *Cf. People ex rel. Lodes* v. *Dept. of Health*, 189 N. Y. 187.

Although no due process or equal protection contention was urged in *La Forest* v. *Board of Commissioners, supra* (92 F. [2d] 547, cert. den. 302 U. S. 760), we think that case serves to emphasize the lack of merit in petitioners' contentions of that nature in the present proceedings. There, an attack was made (on other constitutional grounds) upon a statute empowering Commissioners of the District of Columbia to revoke automobile driving licenses with *or without* a hearing, for any cause deemed sufficient by them, such determinations being reviewable in judicial proceedings. The statute was held valid by the Circuit Court of the District of Columbia (one Justice

dissenting); and the Court did not suggest, nor did counsel urge, any theory of invalidity based on due process grounds. This Court denied certiorari (302 U. S. 760). We submit that the like result should follow in this case.

CONCLUSION

The petition for certiorari should be denied.

Sept. 11, 1945.

Respectfully submitted,

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Appendix

Statute Involved

Article 2 of the Workmen's Compensation Law, entitled "COMPENSATION", §13-d thereof, as amended by L. 1941, c. 307, § 2 (prior to amendment by L. 1944, c. 459, § 3), provided as follows:

"§ 13-d. Removal of physicians from lists of those authorized to render medical care.

1. The medical society or board that has recommended the authorization of physicians to render medical care under this chapter shall investigate, hear and determine all charges of professional or other misconduct by any authorized physician, as herein provided, under rules and procedure to be prescribed by the industrial council of the department of labor and shall report evidence of such misconduct, with their determination thereon to the commissioner. Such investigation, hearing, report and determination may be made by the board of an adjoining county upon the request of the medical society of the county in which the alleged misconduct or infraction of this chapter occurred. The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commissioner.

2. *The commissioner shall remove* from the list of physicians authorized to render medical care under this chapter the name of any physician who he shall find *after reasonable investigation* is disqualified because such physician (a) *has been guilty of professional or other misconduct* or incompetency in connection with medical services rendered under this chapter; or

(b) has exceeded the limits of his professional competence in rendering medical care under this chapter or has made materially false statements concerning his qualifications in his application for the recommendation of the medical society in the county in which his office is located, or of the board designated by it, or of a board as provided in section thirteen-b; or

(c) has failed to submit full and truthful medical reports to the commissioner, the industrial board, or the employer within the time limits provided in section thirteen-a, subdivision four, of this chapter with the exception of injuries which do not require more than ordinary first aid or loss of time beyond the working day or shift; or

(d) has rendered medical service under this chapter for a fee less than fixed by the commissioner as the minimum rate in his locality; or

(e) *has participated in the division, transference, assignment, rebating, splitting or refunding of a fee for medical care under this chapter;* or

(f) has solicited, or has employed another to solicit for himself or for another the professional treatment, examination or care of an injured employee in connection with any claim under this chapter.

Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, *either before or after investigation by a medical society* or board as herein provided, or to temporarily suspend the authorization of any physician that he may believe to be guilty of such misconduct." (Italics supplied.)